NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT (IRA), Appellant	:	Order Vacating Decision and Remanding Case
v.	:	Docket No. IBIA 92-185-A
JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	December 23, 1992

Appellant Native Village of Venetie Tribal Government (IRA) seeks review of a May 4, 1992, decision issued by the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), denying its application for a fiscal year 1992 Training and Technical Assistance grant. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision, and remands this case to the Area Director for further consideration.

Appellant submitted a timely application for funding under the grant program, which was announced at 57 FR 160 (Jan. 2, 1992). The Area Director denied the application by letter dated May 4, 1992. Appellant's notice of appeal to the Board did not include a copy of the Area Director's denial letter. After receipt of the administrative record and examination of the denial letter, the Board noted that the letter did not provide appellant with reasons for the denial of its application. Citing Bowen v. American Hospital Association, 476 U.S. 610, 626-27 (1986), in a July 9, 1992, order the Board required the Area Director to provide appellant with a statement of the reasons for the denial. The Area Director issued a supplemental decision on July 21, 1992. 1/

1/ The original of appellant's opening statement was filed with the Area Director rather than the Board. The statement was forwarded to the Board by the Area Director with an accompanying statement by the Area Director. There is no indication that the Area Director served a copy of that statement on appellant. The Board's regulations require that every document filed with the Board must be served on opposing parties. See 43 CFR 4.310(b). Failure to serve a party results in a denial of due process in that the party does not have the opportunity to respond. The Board reached its conclusions in this case independently of the Area Director's statements.

Appellant contends that the Area Director has misappropriated Federal funds by approving grant applications of entities that are not tribes with written constitutions. Appellant argues that Congressional intent was for tribes with written constitutions to assume programs previously administered by BIA. In support of this argument, appellant cites the November 1989 report submitted to the Senate Select Committee on Indian Affairs by the Special Subcommittee on Investigations. Appellant contends that this report shows Congressional intent in this area.

The Board disagrees. The report of the Special Subcommittee on Investigations is merely an investigative report. It does not evidence Congressional intent in any area unless and until some or all of its recommendations are incorporated into specific legislation. Congress has not enacted legislation restricting the availability of grants to tribes with written constitutions.

Appellant also contends that there were errors in scoring its application. In general, appellant challenges the use of fractions in scoring some of the applications. The Juneau Area Office's printout of final application decisions shows that some of the applicants received final scores with .33 or .67, while other applicants, including appellant, received whole integer scores. Appellant alleges that the use of fractions had no legitimate basis, and states its belief that

> this fractional percentage point scoring method is used discriminately as convenient means to "shave points" either one way or the other, depending on the tribe's position with the Juneau Area office, to increase or decrease a certain tribe's score. Evidence of abuse of discretion with regards to scoring is demonstrated in that all five successfully funded applications were either from Location 1 or Location 4 in Alaska.

The Board believes that the appearance of fractional final scores is explained by the fact that each application was rated by three reviewers. When whole integer scores are added together and divided by three in order to arrive at an average score, the resulting number can be a whole integer, or an integer followed by a 1/3 or 2/3 fraction, which is written in decimal as .33 or .67. The Board finds no reason to believe that the appearance of fractions in the final scores of applicants related to anything other than simple mathematics.

Appellant also disputes the scores given to its application under specific criteria. Each of appellant's objections in this area relate to comments appearing on the Review Committee rating sheets prepared in the Area Office.

In regard to the rating of appellant's application, the Board notes that only one Review Committee rating appears in the administrative record. The cover sheet for the rating is signed by three individuals. It thus

appears that either the rating was a composite of the comments and scores given by the three reviewers or the three reviewers completely agreed on each comment and score. The Area Director's decision was based precisely upon the comments and scores given to appellant's application in the one rating. If the reviewers agreed upon the rating, this fact should be clearly stated, not left to interpretation. The better practice might well be to include separate rating sheets for each reviewer even if the reviewers were in agreement. However, given its disposition of this case on the merits, the Board declines to reverse or vacate the Area Director's decision on this ground.

Appellant first objects to the comment appearing under the "Work Statement" criterion that its application places "emphasis on quickly having EVERYTHING done at once, rather than a gradual building of skills and equipment" (Emphasis in original). Appellant contends that "the attitude of the reviewer is that the appellant is not able to learn and perform quickly enough to meet program objectives (Appellant's Statement of Reasons at 4)."

In reviewing grant applications, BIA must exercise the expertise and insights it has developed in dealing with tribes that are attempting to improve their performance in the area of the grant program. The fact that the reviewers believed that appellant might be attempting too much too quickly is a conclusion based upon that expertise. BIA is entitled to reach such conclusions. The purpose of Board review of BIA grant program decisions is not to "second-guess" each BIA conclusion, but to ensure that, in reaching those conclusions, BIA properly considered all legal prerequisites to the exercise of discretion. See, e.g., Oneida Indian Nation v. Deputy Commissioner of Indian Affairs, 21 IBIA 215 (1992). Appellant has not shown error in the Area Director's exercise of discretion and expertise.

Appellant's second objection is that under the "Budget Justification" criterion, the reviewers state that there "seems to be a lot of consulting which could be deleted and work done by BIA advisors." Appellant contends that it was not required to use BIA advisors under the program. Appellant received a score of 5 out of a possible 10 under this criterion.

The Board has carefully reviewed the program guidelines in the Federal Register. The guidelines refer to consultants or third-party technical assistance providers in three places. Nowhere do the guidelines indicate that it is inappropriate or impermissible to use consultants, or require that consultant services be provided by BIA. In fact, the guidelines do not even refer to the possibility of BIA employees acting as consultants or advisors under a Training and Technical Assistance grant. Given the wording of the guidelines, the Board holds that it was improper for the Area Director to downgrade appellant's application on the grounds that appellant proposed to rely upon third-party consultants rather than upon BIA advisors. Cf., Oneida Indian Nation, 21 IBIA at 217 (holding that it was improper to deny an application on the grounds that the applicant intended to rely upon third-party assistance instead of hiring staff).

Appellant also objects to the fact that it received no points out of a possible 15 under the "Management or Self-Monitoring System" criterion. The reviewers there stated: "See consultants monitoring financial/mgmt systems but don't see regular reports to Tribal Council. Question consultants in organization chart between Council and staff. What happens later? Where's the relationship between Council and staff?" (Emphasis in original). Appellant contends that BIA erred in interpreting the role of the consultant "and is implicitly questioning the mental capabilities of tribal members by assuming only consultants will be performing monitoring duties (Appellant's Statement of Reasons at 5)."

The Federal Register announcement provides that an application must indicate "how the grantee will monitor progress in achieving grant objectives and how corrective action will be taken, if necessary." 57 FR at 162. The Board reviewed appellant's application, including the organizational chart, and did not find any discussion of monitoring. It is an applicant's responsibility to demonstrate that it meets the criteria. The Board finds that appellant did not provide any basis for the award of points under the "Management or Self-Monitoring System" criterion.

Based upon the preceding discussion, the Board holds that the Area Director erred in reducing the points awarded to appellant's application based upon the fact that appellant proposed to use outside consultants rather than to seek advice from BIA. The Board is unable to determine conclusively from the administrative record whether appellant's application would have been approved, but for consideration of this invalid reason. The Area Director's decision is vacated, and this matter is remanded to him for a determination of whether, without consideration of the invalid reason, appellant's application would have been approved or denied. If he concludes that appellant's application would have been approved, the Area Director shall further determine an appropriate remedy, if, as the Board assumes, funds for the FY 1992 Training and Technical Assistance grant program have all been distributed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Juneau Area Director's May 4, 1992, decision is vacated, and this matter is remanded to him for further consideration in accordance with this opinion.

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Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge